

ARTICLE APPEARED
ON PAGE 31TIME
6 April 1987

George Shultz's Feisty Lawyer

Abraham Sofaer draws fire as State Department legal adviser

Seated at a table before the Senate Foreign Relations Committee, his hands clasped tightly, the diminutive State Department legal adviser, Abraham Sofaer, hardly looked the role of enfant terrible. But after being praised publicly by Reagan and Secretary of State George Shultz, Sofaer last week stared straight ahead as Democratic Senator John Kerry of Massachusetts delivered a harsher verdict: "You may say the President hasn't created a constitutional crisis . . . maybe you have. Maybe your memorandum has."

This sharp attack was typical of the controversy Sofaer has triggered by his attempt to reverse an almost universally held understanding of the 1972 ABM treaty so that the Reagan Administration would be able to test SDI components in space. It was not the first time he has come under fire. In nearly two years as the top legal adviser to Shultz, Sofaer has offered a series of aggressive can-do opinions on a range of foreign policy issues. Democratic Senator Joseph Biden calls Sofaer's work an "unconscionable politicization of the office."

The opinion on the ABM treaty is particularly vulnerable. Sofaer queried nobody from the original negotiating team except Paul Nitze, the President's special adviser on arms control. A recognized authority on the pact, Nitze supported Sofaer's conclusion that the agreement did not forbid research and testing of "exotic" weapons such as lasers and particle beams. Senators savaged Sofaer for relying heavily on the negotiating record, ignoring assurances made to the Senate during ratification. Special irritation was reserved for the way Sofaer quoted documents and sources out of context. In a courtroom, says Georgia Democrat Sam Nunn, such sleight of hand would warrant an "admonition from the judge, maybe a contempt citation."

Deeply shaken, Sofaer yielded to the threat of a Senate subpoena last week to explain his opinion. Although he still believes the ABM treaty permits Star Wars testing, Sofaer conceded that his methodology had been flawed, a failure he attributed to young staff lawyers. Some Senators rallied to the defense of Sofaer. Democrat Ernest Hollings of South Carolina criticized his colleagues for "rushing to judgment" and argued that the "record shows no ambiguity that the Soviets refused again and again to agree to prohibit future systems."

Sofaer has consistently interpreted international law to justify activist, unilateral action by the U.S. He offered the justification for using

force against nations harboring terrorists in what has become known as the "Shultz Doctrine." He supported the Administration's widely criticized decision to withdraw partly from the jurisdiction of the International Court of Justice after the court ruled against U.S. support for the Nicaraguan *contras*. "The U.S. is supposed to be building up international law, not destroying it," says Mark Feldman, a Washington attorney and former staffer in the legal adviser's office.

Considerable criticism dogged Sofaer's performance as head of the U.S. delegation that traveled to Jerusalem in December 1985, after Jonathan Jay Pollard was charged with spying for Israel. While the State Department issued a statement lauding the Israeli government for its "full cooperation," Justice Department officials on the delegation have charged angrily that they were "misled" by the Israelis. Jerusalem had withheld the name of Pollard's handler, Aviam Sella, and had delivered only 163 documents of the thousands purloined by Pollard. Sella was subsequently indicted in the U.S. on espionage charges, and the Justice Department is now moving to indict three additional Israeli officials.

For all this, the feisty Sofaer stands high with Secretary Shultz, who hired him after admiring his performance as federal district court judge in the libel suit by former Israeli Defense Minister Ariel Sharon against TIME magazine.* The son of Sephardic Jews, Sofaer, 48, was born in Bombay, and served for a decade as a distinguished professor at Columbia Law School. From the start he was controversial at the State Department. Although the "Judge" was acknowledged to have a brilliant legal mind, his abrasiveness irritated many of his staff outside the immediate circle of newcomers he brought with him.

Opinions are split on how Sofaer runs the office of legal adviser, a prestigious but traditionally little known department of some 100 lawyers that serves as principal counsel to the Secretary of State on matters of international law. To some observers, Sofaer has done no more than would be expected of an attorney serving his client—even if that client is a policymaking arm of the U.S. Government. "Abe Sofaer is a great New York lawyer," Governor Mario Cuomo told a breakfast group. "If they tell him 'Make it legal, Abe,' he'll make it legal." Sofaer refuses to get caught in a law-vs.-policy dogfight. He cites Lyricist Sammy Cahn's dictum that it is impossible to say "what comes first, the music or the words."

That view sits badly with those like Roberts Owen, a predecessor of Sofaer, who argue that the "job isn't just another legal hired gun." The post is unique in that the legal adviser's opinions are often what lawyers call "non-justiciable"—not subject to appeal. In this job more than any other legal post in America, says Professor Richard Gardner of Columbia Law School, "Sofaer's judgments should be *sub specie aeternitatis*" (for eternity).

Attention is likely to remain focused on Sofaer, if only because in arguing the ABM case he has raised an unprecedented challenge to the Senate. Sofaer has claimed that nothing the Administration tells the Senate during the ratification process is binding, a view that Professor Laurence Tribe of Harvard Law School says "would give the Senate a meaningless role in treaty ratification." When Biden sputtered, "That's incredible. That's absolutely staggering," Sofaer mumbled, "I'd like to talk to you about that." Thundered Biden: "We will."

—By Bruce van Voorst/

Washington

*The jury in that case found that TIME had erred in its description of a meeting between Sharon and Lebanese leaders prior to the 1982 massacre of Palestinian refugees in the Sabra and Shatila camps in Beirut. The description was defamatory, the jury held, but TIME did not libel Sharon because the magazine's statement was published without knowing or reckless falsity.



The "Judge" as a witness at last week's Senate hearing
His opinions justify unilateral action by the U.S.